IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

ARBITRATION PETITION NO.35 OF 2004

...

Larsen & Toubro Limited ...Petitioner

v/s.

Sunfield Resources Pvt.Ltd. ...Respondent

...

Mr.Pradip Sancheti with Mr.B.B. Saraf and S. Chandozana i/b M.K. Ambalal & Co. for the Petitioner.

Mr.S.K. Mukherjee with Mr.A.M. Vernekar for the Respondent.

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CORAM: D.K.DESHMUKH, J.

DATED: 30th June ,2005

JUDGMENT:

1. By this petition the Petitioner challenges the award made by the learned Arbitrator. By the award the learned Arbitrator allowed the claim made by the Respondent/claimant and rejected the counter claim that was made by the Petitioner. The Respondent is the original claimant. The Petitioner and the Respondent had entered into an agreement whereby the Respondent had agreed to supply and the Petitioner had agreed to buy Steaming Coal. The quantity to be supplied was mentioned in clause 4 of the agreement. In addition to the five shipments agreed to be supplied, there was an option cargo (sixth shipment), which was to be confirmed by the Petitioner. The claim of the Respondent was for demurrage against the Petitioner in the sum of US$ 2,45,337.92 incurred by the vessel hired by the Respondent under the contract between the parties. Pursuant to the agreement between the parties the Respondent shipped to the Petitioner cargo in five shipments and they were discharged at the port nominated by the Petitioner. According to the Respondent in each of the shipments,

since the vessel went on demurrage the Respondent prepared laytime calculation based on the statement of fact and submitted the same to the Petitioner along with other documents and commercial invoices for demurrage claim. Under the terms of the contract the demurrage or despatch claim had to be settled within 60 days of the submission of laytime statement with supporting documents and if there was any disagreement towards laytime statement that had to be raised by the other party within 30 days after such statement is transmitted and received and if no such dispute is raised, then the statement is considered as having been accepted as correct. The Petitioner disputed its liability to pay any demurrage to the Respondent. According to the Petitioner no demurrage was payable because according to the Petitioner right of the Respondent to receive the amount of demurrage was only in the form of indemnity and that there was no evidence to show that the Respondent had made payment of any demurrage to the vessel owner. According to the Petitioner, unless the Respondent establishes that it had paid demurrage to the vessel owner, the Petitioner was not liable to pay any demurrage.

2. On behalf of the Petitioner, counter claims were made. The counter claim which was in the amount of US $ 4,78,619.62 relates to alleged loss suffered by the Petitioner on account of the Respondent's breach of contract in failing and neglecting to supply option cargo under the terms and conditions of the contract. According to the Petitioner, though it had complied with the requirements of the contract the Respondent did not supply the option cargo, which resulted in loss to the Petitioner.

3. On behalf of the Petitioner, it is submitted that on a true and proper interpretation of Clause 10(v), there is only one interpretation possible for the following reason:

. The Respondent's witness in evidence in chief has expressly stated as under:-

"It was agreed and understood between the parties that the demurrage that would be payable would be demurrage actually paid by the Claimant to the vessel owner."

. There is no cross-examination on the above aspect

by the Respondent and the Respondent has also not let contrary evidence on this aspect.

. The Respondent, by its letter dated 22nd November, 2000 forwarded a copy of the Contract of Afrieghtment (COA) to the Petitioner and further stated that "With the submission of the above COA we believe that a requisite documents are in your possession for remittance of the demurrage."

. It is evident from the above letter that the Respondent itself admits that the COA is a relevant document in relation to the seller's (Respondent's) claim for damage against the purchaser (Petitioner).

. During the course of rejoinder/ submissions before the learned Arbitrator, it was the case of the Respondent itself that the demurrage clause in the contract provided only a maximum, leaving a gap and that the gap has to be filled up by taking the amount that the Claimant had to pay to Glencore. This aspect of the matter has not been considered and completely overlooked in the Award.

. Equally, the alternative submission on behalf of

the Claimant that the amount of demurrage payable was subsequently agreed at the time of nomination under each vessel and that the amount so subsequently agreed is what the Claimant had agreed to pay Glencore, also shows that it is not at all a disputed position between the parties that even while nominating the vessel the rate of demurrage indicated was the rate agreed between the Respondent and the Glencore. Even this aspect of the matter has not been gone into and considered in the Award.

. The Petitioner's witness has also expressly stated in his evidence in chief that : "One of the details that is supplied at the time of nomination is demurrage/ dispatch rate in respect of the said vessel as agreed between the vessel owner and the Claimant. The said rate is indicated in the letter of nomination."

. This part of the oral evidence was not even sought to be cross examined and in fact, the submissions of the Claimant mentioned above clearly admit the factual position as mentioned by the witness.

. It would, therefore, appear that in the specific

facts and circumstances of this case, both the concerned parties were at all relevant times conscious and aware of the fact that the demurrage payable by the Respondent to Glencore (who were appointed to look after shipping arrangement) was a relevant fact.

. Clause 10(v) of the Contract also specifically recognises payment of demurrage to vessel-owner. Since the clause provides that: "Buyers shall pay demurrage to the seller or vessel owner through the seller, if required." The clause has to be interpreted in such a manner that the words "if required" are not rendered otiose.

. The words "if required" clearly indicate that in a case where the seller transports the goods by a ship belonging to a third party (vessel owner), the demurrage would be payable to the vessel owner and, therefore, the words "if required" relate to the liability, if any, of payment of demurrage to the vessel owner. In contrast, if the seller himself is the vessel owner, then obviously, the demurrage is payable to the seller as he would suffer the loss by reason of vessel being detained beyond the agreed

period of time.

. In the admitted facts of the present case, the seller is not the vessel owner and the goods have been shipped in a third party vessel under COA and, therefore, between the two alternatives, the relevant portion of the clause applicable is the portion relating to payment of demurrage to the vessel owner.

. In any case, the claim for demurrage is a claim arising in the event of breach of contract i.e. detention of the vessel beyond the agreed period of time. As such, any amount agreed to be paid under the contract for such a breach would be governed the provisions of Sections 73 and 74 of the Indian Contract Act. In either case, the Claimant would be only entitled to a reasonable compensation for loss suffered except in a case where the claimant can satisfy that it is not possible to prove/assess the quantum of damages.

4. It is the contention of the Petitioner that demurrage is in the nature of liquidated damages. The arbitrator has held that demurrage did not represent liquidated damages but was in the nature of

a fixed charge.

5. It is submitted by the learned Counsel for the Petitioner that the award of the learned Arbitrator is contrary to universally accepted concept of demurrage being in the nature of damages which has also been accepted by this Court in a judgment dated 30th April, 2003 in the case of Narmada Cement Company Ltd. v/s. Chowgule Stamship Ltd.

6. It is further submitted by the learned Counsel that in the light of the aforesaid, it is abundantly clear that 'demurrage' is commonly and universally used to denote damages which became due to the ship owner for the detention of the ship beyond the agreed period of time allowed for discharge (or loading) of cargo. The very language of the clause 10(v) referred to hereinabove provides only for a ceiling. As such, once the Petitioner disputes the claim for damages by way of demurrage, the learned Arbitrators could not have awarded the same unless the claimant proved the same.

7. It is submitted that the learned Arbitrator has committed a patent error of law in holding that the

claim for demurrage is not by way of damages and has thereby proceeded on an erroneous basis in granting the claim without the Claimant leading any evidence to show that they have suffered any loss or damage much less to quantify the same. On the contrary, the Claimant's failure to produce the relevant evidence, despite being put to express notice on this behalf, during arbitration proceedings, clearly shows that they have not incurred or suffered any loss. Moreover, in answer to the query raised by this Court, the Respondent's Counsel expressly admitted that from the record, the Respondent was not in a position to show either payment of demurrage or even a demand made upon it for payment of demurrage. Thus, it is apparent that the Respondent has not incurred any loss and as such, the question of award of any damage did not arise.

8. It is contended on behalf of the Petitioner that the contract contains a force majeure clause which reads:

> **. "Seller shall not be liable to Buyer nor shall Buyer be liable to Seller for any delay interruption in the performance of**

> **obligations hereunder (including delay or loss of a damage to any vessel after notification), if such delay, interruption or failure is due to result from war (whether declared or undeclared), blockade, revolution, riot, insurrection, military mobilization, civil commotion, strike, act of god, public enemies, governmental restrictions... or any other causes beyond the control of or which cannot reasonably be avoided by Seller or Buyer as the case may be."**

. The award on the face of it shows that the fact that there was a strike at Chennai Port from 6 a.m. on 18th January 2000 to 6 a.m. on 25th January 2000, is not at all in dispute. Equally, the fact that vessel m.v. Rishikesh berthed on 24th January 2000 is also not in dispute.

. The force majeure clause expressly absolves the Buyer (Petitioner) from its liability to the Seller (Respondent) for any delay, interruption or failure in the performance of the obligations, if it is due to strike.

. Once the factum of strike is proved by the Petitioner by cogent evidence, and that fact is not in dispute, in the common course a presumption arises in favour of the fact that due to strike,

discharge of cargo was delayed.

. There is no evidence led by the Respondent either to show that despite this strike, discharge of cargo was continued at the Port of Chennai or that the strike was partial etc.

. The issue, whether the vessel could be berthed or not, only concerns the period of about 10 days prior to the strike. As far as the strike period is concerned, whether the vessel is in berth or not, it would, in any case, affect/delay the discharge of the cargo.

. Therefore, the only possible conclusion from the undisputed facts was that the duration of strike could not constitute a delay and for that period, the Petitioner could not be liable to pay demurrage to the Respondent. It is pertinent to note that even the contract of Afrighment produced by the Respondent contains a clause for exclusion of strike period. However, there is complete absence of information as to how this aspect was dealt with by/between the Respondent and Glencore if at all there was liability to pay demurrage.

. The Award does not deal with this aspect directly, except comments on lack of particulars in pleadings. It is not in dispute that the Petitioner was allowed to lead evidence and to prove the duration of strike in support of its plea of exclusion made in its Written Statement and there was no objection to the same for want of particulars in the pleadings. As such, it is patently unjust and improper for the learned Arbitrator not to exclude the said period in the calculations of demurrage merely on the ground that the pleading in this behalf is general without giving the period of strike.

. The two admitted documents on record in relation to the option cargo are the Fax dated 20th December, 1999 and the Fax dated 25th December 1999.

. The letters dated 20th December 1999 and 25th December 1999 confirm the option cargo.

. By the letter dated 20th December, 1999 Glencore on behalf of the Respondent forwarded "final shipment schedule" for 21 cargoes (which includes

the option cargo). Thus the letter dated 20th December, 1999 makes it abundantly clear that the schedule forwarded was the final schedule.

. This was clearly and unambiguously accepted by the Petitioner by the letter dated 25th December, 1999. Not only were the dates of shipment agreed, but even the vessel were allocated between the three Seller, including the Respondent. It shows allocation of vessel to Respondent. This was thus a confirmation of final schedule including option cargo.

. The Petitioner's witness in the affidavit of evidence stated at Page 22 of Vol.III-

"15. Thus, by the said two fax messages, not only the most likely shipment schedule, but confirmed shipment schedule for the option cargo was duly communicated by the Respondent (the Petitioner in this Petition) and the option cargo was confirmed"

. Glencore was admittedly the agency appointed for handling shipping/chartering activities and were in fact communication the shipment schedule (of the firm as also option cargoes) and for the purpose of

confirmation of shipment of option cargo.

. The authority of Glencore is confirmed by letter dated 23rd May, 2000.

. The Petitioner's witness has expressly stated that 21 cargoes referred to in the letter dated 20th December 1000 included the option cargo under the contract with the Respondent.

. As such, there was no manner of doubt after the exchange of above letters that what was communicated was "final schedule for 21 cargoes" (including the option cargo) and the Petitioner communicated acceptance of the shipment of schedule for 21 vessels as given in the said Fax. Therefore, there is no doubt that what was accepted was not merely the 'most likely shipment schedule' but the 'final schedule'. The language of the letter dated 20th December also indicates that the final schedule was prepared "in lime with your (Petitioner) requirement".

. The Respondent's contention that these two letters can only be treated as confirmation of most

likely shipment schedule is, ex facie incorrect. Equally, the Respondent's contention that the most likely shipment schedule was required to be confirmed subsequently but it was not so done is also incorrect inasmuch as the final schedule, as communicated by Glencore, was accepted by the Petitioner.

. The Respondent's reliance on the correspondence/discussion prior to the execution of the contract, wherein the Petitioner had communicated that it may require time up to 15th February, 2000, is completely irrelevant inasmuch as the clause in the contract did not take away the Petitioner's right to give a final confirmation prior to 31st December, 2000. The extension of time for this purpose up to 15th February, 2000 was merely for the convenience of the Petitioner but it did not take away the Petitioner's right to give a confirmation earlier.

. The subsequent letter dated 20th January 2000 of the Petitioner cannot and does not, in any way, derogate from the above position. Merely because a subsequent letter was written, does not alter the

undisputed position emerging as above and, therefore, the learned Arbitrator committed a patent error in not giving due weight to the undisputed position emerging from the admitted documents on record.

. It is the contention of the Claimant that because the confirmation of the option cargo was three days late, the Claimant was not bound to perform the contract. However, for the Claimant to succeed in this plea, it was necessary for the Claimant to plead and prove that time was of essence of the contract in the said stipulation. Alleged delay in confirmation by itself does not absolve the Claimant form performing its obligation.

9. On behalf of the Respondent, so far as the submissions made on behalf of the Petitioner in relation to entitlement of the Respondent for payment of damages is concerned, it is contended that there are at least four crucial facts that are fatal to this argument. The first is that there is nothing whatsoever in the Agreement to indicate that the liability to pay demurrage, which is clearly created in favour of the Seller, in fact is really

an indemnity. An indemnity clause is not difficult to draft; there is no reason why the parties could not have framed the liability in indemnity form. The Respondent seeks to read into the Contract something that is simply not there. The provision for making payment to the shipowner is only when it "is required", and that can mean only when such payment is called for by the Seller. In other words, the provision is no more than a convenience for the Seller. It certainly does not mandate that no payment of demurrage is to be made if the Seller has not paid demurrage to the shipowner.

. The second reason why the plea that the demurrage in Clause 10 of the Sale Agreement is no more than an indemnity is unsustainable is that were it so, then there were no reason at all for the detailed stipulations relating to the calculation of demurrage. Stipulations such as; when Notice of Readiness is to be tendered, the circumstances under which it may be tendered, when the laytime is to commence, the discharge rate on the basis of which the laytime is to be calculated, the effect of breakdown of ship board machinery, etc. If the intention were that the Respondent should pay the

Claimant that which the Claimant was bound to pay the shipowner, these detailed provisions were wholly redundant and superfluous.

. Thirdly, in the same breath as Clause 10(v) creates the liability for demurrage it also creates the corresponding right to despatch. Despatch is not indemnity. Irrevocably linked to despatch, demurrage necessarily takes colour from its twin.

. Finally, if demurrage under Clause 10(v) were in fact in the nature of an indemnity then the second subparagraph of Clause 10(v) would have unquestionably specifically mentioned the Charterparty as one of the documents required to be produced by the Respondent. Sunfield, in seeking payment, and also proof of payment. At no stage till the Reply in the Arbitration was filed on the 31st August, 2001, did the Petitioner even ask for the Charterparty to be produced to it for quantifying the demurrage nor ask for any proof of payment whatsoever. Given that the last voyage under the Contract was that of the Pataliputra which ended on 16th June 2000, the first occasion when the issue was taken up by the Petitioner was almost 14

months after the conclusion of the Contract.

. On the contrary, the Petitioner in the meantime promised on more than one occasion to make payment of demurrage to the Respondent. In a fax dated 12th September 2000 the Petitioner informed the Respondent that its claim for demurrage was "under final audit" and the Respondent would be informed shortly. In its fax of the 30th October 2000 the Respondent recorded that the Petitioner's Vice-President had confirmed to it that the Petitioner was preparing to remit the demurrage in the next two or three days. The Petitioner, by fax of the 1st November, 2000 stated that "due to some organizational changes" it could not verify the claim amount and communicated to the Respondent. The Petitioner went on to regret the delay, but assured the matter was "being attended on priority" and the Petitioner would revert as soon as the claim was verified. On the 9th November 2000 the Petitioner came out with the excuse that it had "certain difficulties in documentation as per the requirement of Indian law for remittance of foreign exchange" and it was trying to find a solution. On the 22nd November, 2000 the Respondent forwarded to

the Petitioner a copy of its Contract of Afreightment. There is nothing to show that it was sent in answer to the Petitioner’s demand. But if at all, it was sent only to assist the Petitioner in getting clearance from the Exchange authorities for remitting the payment.

. What is significant is that neither when making its "audit" or when "verifying" the demurrage claim, did the Petitioner call for the Charterparty, nor did it make the slightest reference even to proof of payment.

. The Petitioner submits that the words "At the discharging port, buyers shall pay demurrage to the Seller or Vessel owners through sellers if required...." must be read as "At the discharging port, buyers shall pay demurrage to the Seller if the Seller has made no contract of Charterparty or Vessel owners through sellers if required under the Charterparty that the seller has made with the vessel owners."

. There are at least the following difficulties with this interpretation. First, and most

damningly, it seeks to introduce into the Contract words that are just not there.

. Second, if the intention were that the Petitioner was to make payment to the Vessel Owners if there was a liability for demurrage under the Charterparty, the word "required" would be a very odd word to use. No Charterparty would "require" the Buyer to make payment to the Vessel owner when the former was not even a party to it. If the intention was that demurrage was to be paid to the vessel Owners whenever the Vessel owner was entitled to demurrage, "if required" is a very ineffective way of saying it.

. Third, even suppose the Seller was under liability to demurrage to the vessel owners but wished to pay that on his own or the Vessel Owner was not agreeable to the Buyer's cheque, in which of the two categories would the case fall under sub-clause (v): payment to Seller or payment to Vessel Owner? Would sub-clause (v) mandate that the Seller must nevertheless make the demurrage cheque or draft in favour of the Vessel Owner? The answer to this question, in fact, is the answer to the

whole issue of interpretation of the sub-caluse. The only rational answer can be that payment will be made by buyer to the Vessel Owners if the Seller so desires it. That is precisely the answer that the learned Arbitrator gave his Award.

. Fourth, on the Petitioner’s interpretation, if the Seller has not made a Voyage Charterparty contract (with demurrage) but has made a Time Charterparty Contract with the Vessel Owner, into which of the two categories of sub-caluse (v) will the case fall?

. These are some reasons for which the Petitioner’s stand on the construction of sub-clause (v) is liable to be rejected. The Arbitrator’s conclusion that the words "if required" in sub-clause (v) did not show that the demurrage provision was in the nature of indemnity was, a conclusion that he was not entitled to take.

. If the contract leaves the rate of demurrage open, only stipulating the maximum, WHY does it follow that the omission or hiatus is to be filled up by the amount of demurrage actually paid and no

other? There is really no reason suggested. It is presented as a self-evident trust. But it is not self-evident; in fact it is not even true.

. In fact the answer to the submission is that if a rate is to be filled in, it is a rate that has to be supplied. A missing rate cannot be filled in by an amount. But that is precisely what the Petitioner's second submission boils down to.

. It is submitted that the complaint in paragraph 2A of the Petitioner's Reply in the Arbitration that the actual rate of demurrage has been left unstipulated cannot lead to the conclusion that therefore the whole complex scheme of demurrage set out in Clause 10 of the contract must be abandoned and jettisoned, and substituted by what amount, if any was actually paid by the Claimant to the Shipowner.

. How then must the hiatus be filled? And in this connection it is important to note in the very first instance that it is neither party's case that the Contract or even Clause 10 or even sub-clause 10(v) thereof are invalid by reason of the failure to

stipulate the exact rate of demurrage. If either the Contract or its said provisions were invalid the question of claiming demurrage would not arise. It is not the Petitioner's case that there can be no claim for demurrage. It is the Petitioner's case that the claim for demurrage must be for that amount actually paid to the Shipowner.

. Given the fact then that the Contract and the said clause are mutually accepted as valid and binding, the issue boils down to; how should the absence of an exact stipulation of the demurrage rate be supplied?

. The fact that the Agreement leaves the exact rate to be filled in indicates that the parties were agreed that the rate would be mutually arrived at by consensus as the contract progressed. Businessmen often leave issues to be resolved on between them as the contract is worked out. How the rate was to be arrived, what procedure was to be adopted, was left to the parties' convenience; in all likelihood it was to be informal or else the Contract would have stipulated the formality.

. It was the Petitioner, it appears, who suggested the method that should be adopted for crystallising the demurrage rate. By letter dated 16th September, 1999 it instructed the Claimant to indicate in its Letter of nomination for each vessel the demurrage rate. In retrospect this was a fairly acceptable procedure, to tag the notification of the demurrage rate to the vessel nomination, and thereafter the Claimant followed the suggestion. Plainly the Petitioner had no complaint of the rate so notified on each such occasion. And so it was that when the Petitioner was in due course presented with the demurrage invoices by the Respondent there was not the slightest hint of a protest. And why should there be? The rate had been earlier notified by the Claimant in the manner desired by the Petitioner; the Petitioner had on receipt of that notification raised no demur, the omissus in Clause 10(v) was in each case thus filled by mutual consensus.

. What is also relevant is that the letter of 16th September 1999 whereby the Petitioner conveyed the manner in which the Claimant should indicate the demurrage rate actually predates the signing of the Contract. It is therefore perfectly reasonable to

infer that when the Contract was formally signed the parties had already in mind the method of crystallising the demurrage rate for each vessel.

. It is respectfully submitted that Clause (v) contained in itself a provision intended to gave a quietus to laytime and the demurrage disputes. It provided that any disagreement over the laytime statement must be raised by the other party within 30 days after such statement is transmitted and received, otherwise the statement would be accepted as correct. This was a perfectly reasonable and commercial corrective to any lingering uncertainties. The mechanism was in fact applied and implemented by the parties, the Claimant having meticulously submitted its laytime statement for each and every shipment, indicating in each case the demurrage rate of US $ 7000 per day. In no case did the Petitioner indicate any disagreement within the said period, or at until the filing of its Reply in these arbitration proceedings. Whatever be the Petitioner's objections to the earlier subparagraph of Clause 10(v) there could be no good reason whatsoever for not applying this subparagraph--itself the product of the Petitioner's own drafting-

providing 30 days for objection to the laytime statement. There is no good reason why this subparagraph be not applied and the Petitioner consequently be held as having accepted the laytime statement.

10. The learned Counsel for the Respondent submits that in fact the plea of Liquidated Damages is contrary to and inconsistent with the Petitioner's pleaded case that demurrage in the present case was an Indemnity. The Law makes a distinction between a claim for a liquidated sum and a claim for damages. A claim for damages is founded firstly on a plea of breach of contract followed by a claim for compensation. In a claim for a liquidated sum, the plea is not founded on a breach of contract but on the plea that an event has occurred on which an amount has become payable under the contract. The Petitioner's pleaded case that demurrage was in the nature of indemnity was a plea that the right to demurrage under the contract was a right to a liquidated sum, namely the sum that the Respondent paid to the vessel owner.

. It is no answer to say that when pleading the

Indemnity Point the Petitioner had put in issue whether the Claimant had made payment of demurrage to Glencore International. A party cannot be heard to say that it has raised a factual question in the context of a certain Issue that it has pleaded, and is therefore entitled to raise any other issue which involves the same factual question even if that other issue had not been pleaded. Were this approach to be permitted, litigation would be trap and natural justice a mere matter of form.

11. In so far as counter claim made by the Petitioner is concerned, it is submitted that this head of Counterclaim is plainly unsustainable. It proceeds firstly on the footing that under the Contract a mere submission of the shipping schedule was sufficient to give rise to a binding exercise of option for the optional cargo shipment. The submission is plainly contrary to the wording of Clause 4 of the Sale Contract, which required not merely the intimation of the likely shipment schedule latest by 31st December, 1999 but a written confirmation thereafter of the option latest by 15th February, 2000. In fact, the Petitioner well knew this position as is evidenced by its greatly belated

written confirmation purportedly dated 20th January, 2000. The said letter refers to Clause 4;; it confirms the taking of Option Cargo "in terms of Clause 4"; and describes what has gone before as "working with you on the likely shipping schedule for these cargoes." Had this letter been sent and received in time it would undoubtedly have been what was required by Clause 4. There is no doubt, however, that it was sent and received well after the 15th February, 2000 and was thus legally ineffective.

12. In so far as the plea that time was not of the essence, the Respondent and the learned Arbitrator relied on judgment that held that in the case of provisions dealing with exercise of option within a stipulated period, such stipulations were always of the essence.

13. This is a petition filed under Section 34 of the Arbitration & Conciliation Act, 1996. As a result of series of judgments of the Supreme Court it can now be taken as a settled law that this court can interfere with an award made by an arbitrator only if this court comes to the conclusion that on

the basis of the material that was before the learned arbitrator it was impossible for the learned arbitrator to take the view that has been taken by the learned arbitrator in the award. In other words, if the court before which the petition under Section 34 of the Act is filed finds that on the basis of the material which was before the learned arbitrator the view that has been taken by the learned Arbitrator in the award is a possible view, then the court is not justified in interfering with the award. Perusal of the award which is impugned in this petition shows that the reasons in detail have been given by the learned arbitrator for each finding that has been recorded. It is not a complaint of the Petitioner that any piece of evidence or any material which was relevant and which was produced on record by the parties was not considered by the learned arbitrator. In other words, it is not the case of the Petitioner that the learned Arbitrator has excluded from his consideration any relevant material. Perusal of the award shows that the learned arbitrator has narrated the relevant facts in detail. He has referred to the submissions made on behalf of both the parties in detail and has recorded his findings. Therefore,

in my opinion, the appreciation of submissions which were made before me at length has to be from this point of view. So far as the aspect of the claim for demurrage is concerned, it is clause 5 of the contract between the parties which is relevant. That clause reads as under:-

> **(v) Demurrage/Despatch**
>
> **At the discharging port, buyers shall pay demurrage to the Seller or Vessel owners through sellers if required, at the rate not exceeding US$ 8000.00 per day or pro-rata for part of the day and seller shall pay despatch to buyers if earned, at a rate of 50% of demurrage rate, not exceeding US$ 4000.00 per day or pro-rata for part of the day.**
>
> **All demurrage or despatch to be settled within 60 days after laytime statement submitted with supporting documents, like Notices of Readiness, Statement of Facts and Time Sheets.**

Any disagreement over the laytime statement must be raised by the other party within 30 days after such statement is transmitted and received, otherwise, the statement is accepted as correct.

14. There were submissions advanced at length as to the correct construction of this clause. According to the Petitioner, the Respondent's right to recover demurrage from the Petitioner under this clause is only in the form of indemnity and that since it has not been shown that the claimant has paid any demurrage to the vessel owner and the claimant/Respondent has suffered any loss due to vessel going on demurrage, the Respondent is not damnified and cannot claim indemnity. According to the Petitioner, unless the Respondent shows that they have in fact paid demurrage to the vessel owner, they have no cause of action against the Petitioner for recovery of demurrage. Perusal of the award shows that the learned Arbitrator has considered various submissions made on behalf of both sides in detail. One of the approaches adopted

by the learned Arbitrator for construing this clause is to see from the conduct and correspondence between the parties when the work under the contract was being carried out and immediately thereafter as to how the parties understood the clause. In my opinion, this approach adopted by the learned Arbitrator is most appropriate approach. When there is a controversy between the two parties regarding the real meaning to be attached to the clause in the contract, the safest method to find out what is the correct meaning of the clause is to find out as to how the parties understood the clause from their conduct during the currency of the contract. Material available on record shows that at no point of time till reply in arbitration before the arbitrator was filed the Petitioner asked the Respondent to produce either charterparty entered into between the Respondent and the vessel-owner nor did it ask for production of any receipts which were issued by vessel owner in favour of the Respondent towards payment of demurrage. Had the Petitioner construed clause (10) to be in the nature of indemnity clause, every time when claim for demurrage was made by the Respondent, it would have asked for production of copy of the charterparty to

find out whether there is a liability created on the Respondent for payment of demurrage and would have asked for production of documents which will establish that the Respondent has actually made payment of the amount of demurrage to the vessel-owner. The learned Arbitrator in this regard has referred to the statement made by the Petitioner's witness Mr.Patwardhan. Mr.Patwardhan admitted in his cross-examination that the documents which he relied upon while determination to be paid are (i) statement of fact; (ii) verification thereof and (iii) charterparty. Thus, even Mr.Patwardhan does not say that he asked for production of any document by the Respondent to show that they have actually paid the amount of demurrage to the vessel owner. Not only that the Petitioner did not ask for production of receipts showing payment of demurrage by the Respondent to the vessel owner whenever payment of demurrage was asked for to the Respondent, but on the contrary the Petitioner went on promising that the amount of demurrage would be paid. By fax dated 12th September, 2000 the Petitioner informed the Respondent that its claim for demurrage was under final audit and the Respondent would be informed shortly. By fax dated

1st November, 2000 the Petitioner informed that due to some organisational changes it could not verify the claim amount and communicate to the Respondent. The Petitioner, however, regretted the delay and assured that the matter will be attended on priority. By communication dated 9th November, 2000 the Petitioner informed that they are experiencing certain difficulties in documentation as per the requirement of Indian law for remittance of foreign exchange and that they are trying to find out the solution. Thus, in the correspondence exchanged between the parties, there is no reference to the alleged requirement of the Respondent producing document to show actual payment of demurrage by the Respondent to the vessel owner. Even a demand for production of document which will indicate that the Respondent has actually incurred the liability for payment of demurrage is also not to be found. Had the Petitioner understood Clause V to be an indemnity clause, on being asked to pay demurrage the only thing that would have been demanded by the Petitioner would be the documents showing that the amount of demurrage was demanded by the vessel-owner from the Respondent and that it was paid by the Respondent. In my opinion, this conduct of the

Petitioner of not demanding documents from the Respondent which would establish that the Respondent has become liable to pay demurrage and for the documents to show that it has actually been paid to the vessel-owner shows that the Petitioner also did not understand this clause No.V as an indemnity clause. The plea taken by the Petitioner for the first time in its reply to the statement of claim filed before the arbitrator that Clause V of the contract was an indemnity clause is clearly an after thought and it was raised merely to avoid payment of demurrage. In my opinion, therefore, the learned Arbitrator has correctly held Clause No.V not to be an indemnity clause. Once it is held that the Clause No.V is not an indemnity clause, in my opinion, the Petitioner cannot deny its liability to pay demurrage in terms of Clause V of the contract between the parties and the contract which came into existence between the parties as a result of correspondence at the time of arrival of each cargo. It is an admitted position that at the time of arrival of each of the five shipments, the demurrage rate was intimated by the Respondent to the Petitioner and there was no dispute raised by the Petitioner. For the first shipment the vessel mv

"Dakshineshwar", the Respondent sent the vessel nomination on 15th September, 1999. The Petitioner replied calling on the Respondent to give demurrage rate. The Respondent gave the demurrage rate in response, by letter dated 22nd September, 1999 when the Respondent submitted laytime statement. For the second shipment mv "Rishikesh" the Respondent gave the demurrage rate on 3rd December, 1999. It was this rate which was incorporated in the laytime statement by the Respondent. For the third shipment mv "Dakshineshwar", the Respondent gave the demurrage rate on 18-1-2000. The Petitioner by letter dated 25-1-2000 noted that rate. It is this rate which was incorporated in the Respondent's laytime statement. For the fourth shipment, mv "Pataliputpra" , the Respondent gave demurrage rate on 6-3-2000. The Petitioner's letter dated 7-3-2000 notes that rate. This rate was incorporated in the Respondent's laytime statement. For the last and fifth shipment mv "Pataliputpra", the Respondent conveyed the demurrage rate on 20-4-2000. The Petitioner noted the same by reply dated 22-4-2000. This rate was incorporated in the Respondent's laytime statement. Thus, in each case the parties went through the procedure of supplying and

accepting the demurrage/despatch rate. The laytime statements have been submitted by the Respondent in relation to each vessel. Admittedly statements were submitted within the period allowed by clause V. It is also an admitted position that within 30 days of submission of the laytime statement no dispute was raised by the Petitioner. The Arbitrator, therefore, in my opinion, has rightly concluded that the Petitioner cannot dispute its liability to make payment of demurrage as claimed by the Respondent. As I find that the construction put by the learned Arbitrator on clause V to be absolutely correct, in any case a possible construction, it is not necessary for me to consider other submissions made on behalf of both the sides about correct meaning to be attached to clause V.

15. So far as the submission that because of the strike there was delay in discharging the cargo and therefore the Petitioner should not be made liable to pay demurrage is concerned, perusal of the award shows that the decision of the learned arbitrator has turned on appreciation of evidence on record. The learned arbitrator has after referring to the evidence produced on record has held that the

Petitioner has not proved that because of the strike, availability of the berth was reduced the vessel like the vessel hired by the Respondent and that the delay in discharge of the cargo is attributed solely or partly to the strike. It is nobody's complaint that any piece of evidence relevant for considering the matter has been excluded from consideration while deciding this point or that the conclusion reached is an impossible conclusion. In my opinion, therefore, it will not be appropriate for me to reappreciate the evidence on record. Therefore, I do not see any justification for interfering with the finding that has been recorded by the learned Arbitrator on this aspect of the matter.

16. So far as the counter claim of the Petitioner is concerned, perusal of the award shows that the learned arbitrator has after appreciating the evidence on record a finding of fact that the option required to be exercised by the buyer in relation to the option cargo was not exercised by the Petitioner within the time allowed by the contract. This is a finding of fact. A finding of fact can be disturbed in the limited jurisdiction of this Court under

Section 34 of the Arbitration Act only if it is shown that there is an error apparent on the face of the record or that the finding suffers from violation of the principle of natural justice. The learned arbitrator has, after referring to the evidence produced on record, held that the letters which were relied on by the Petitioner to contend that it had exercised the option as required by the terms of the contract can not be said to have been addressed to the person to whom the option was to be communicated and that the contains of the letters show that those letters can not be termed as the letters exercising the option. The learned arbitrator has also, in detail, referred to the correspondence between the parties, in relation to fixing the time limit for exercising the option. The learned arbitrator has relied on the judgment of the Supreme Court in the case of Caltex (India) Ltd. v/s.Bhagwan Devi Marodia, AIR 1969 SC 405 to reject **the contention of the Petitioner that the time was not essence in relation to the exercise of the option. I do not find that the learned arbitrator has excluded any relevant material from consideration in recording these findings. In so far as these findings of fact and law recorded by**

the learned Arbitrator are concerned, I do not find any error apparent on the face of the record. It is nobody's submission before me that the learned arbitrator has not applied his mind to any material which is relevant and is on record in so far as this aspect of the matter is concerned. After having heard the learned Counsel for both sides at length and after having gone through the record I find that the least that can be said is that there are findings possible to record in the facts and circumstances of the case. Therefore, in my opinion, I would not be justified in disturbing the findings recorded by the learned arbitrator on this aspect of the matter. In short, I find , after going through the record and hearing the learned counsel appearing for both sides at length, that the well reasoned award made by the learned arbitrator is not liable to be interfered with by this Court in its jurisdiction under Section 34 of the Act.

17. In the result, therefore, petition fails and is dismissed. The Petitioner is directed to pay costs of the Respondent, as incurred by the Respondent.

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